

87-1230

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No. 87-

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.  
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In The  
Supreme Court of the United States  
1987 Term

W. D. PRICE, JR., Administrator  
of the Estate of LILLIE D. PRICE,

Petitioner,

v.

VIRGINIA ROGERS SCOTT, Executrix  
of the Estate of GUY B. SCOTT, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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December, 1987

39 pp

QUESTION PRESENTED

THE SOLE QUESTION PRESENTED FOR REVIEW  
IS WHETHER AN ATTORNEY'S FAILURE TO DISCLOSE  
HIS OWN NEGLIGENCE TO HIS CLIENT TOLLS THE  
RUNNING OF THE STATUTE OF LIMITATIONS IN  
THE STATE OF GEORGIA.

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No. 87-

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In The  
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W. D. PRICE, JR., Administrator  
of the Estate of LILLIE D. PRICE,

Petitioner,

v.

VIRGINIA ROGERS SCOTT, Executrix  
of the Estate of GUY B. SCOTT, JR.,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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William D. Price, Jr. respectfully

petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered October 28, 1987. (A-1). This petition comes after the Eleventh Circuit affirmed the decision of the United States District Court for the Middle District of Georgia and ordered Mr. Price to pay to defendant-appellee the costs on appeal. Coming within 90 days allowed for the filing of petitions for certiorari under 28 U.S.C. § 2101(c), this petition is timely filed.

#### OPINION BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit was issued without opinion. The opinion of the United States District Court for the Middle District of Georgia is unreported. It is reprinted in the Appendix. (A-2).

#### JURISDICTION

Jurisdiction before the United States

District Court for the Middle District of Georgia rested on diversity of citizenship pursuant to 28 U.S.C. § 1332. Jurisdiction in the United States Court of Appeals for the Eleventh Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 9-3-96, Official Code of Georgia Annotated (Michie 1982) (hereinafter O.C.G.A.):

If the defendant or those under whom he claims are guilty of fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of plaintiff's discovery of the fraud.

STATEMENT OF THE CASE

A. Facts and Proceedings in the the District Court

This case involves the failure of an attorney to pursue a cause of action to set aside a deed and to pursue an action in legal malpractice within the State statute of limitations. The essential facts are not

in dispute. Rather, petitioner seeks review of the lower court's failure to apply relevant state law to these facts.

1. Facts

The facts relevant to the issue presented for review are few and virtually uncontested. They are as follows:

1. Sometime in 1973, plaintiff's deceased, Lillie Price, retained the services of a lawyer, Grady Pittard, to file an action in equity to have a deed set aside. Mrs. Price was of limited mental competence. Attorney Pittard agreed to pursue the action but took no steps to have the deed set aside.

2. After Mrs. Price's death, Petitioner was appointed administrator of the deceased's estate on April 1, 1975, and immediately retained Guy B. Scott, Respondent's deceased, to serve as the estate's attorney. Petitioner informed Mr. Scott that he wished to pursue setting aside

the deed and informed him of the previous lawyer's lack of diligence in pursuing the same matter.

3. Mr. Scott failed to take any action regarding the validity of the deed and failed to advise Petitioner of the existence of a course of action for professional malpractice against the former attorney. Mr. Scott consistently and repeatedly advised the Petitioner upon inquiry that he was working diligently in pursuit of the case, that he was developing papers and that legal matters are generally protracted in time.

4. Mr. Scott managed rental property belonging to the estate. Mr. Scott failed to account for the rental income derived from the lease of that property and did not deposit those funds into the estate's account.

5. Mr. Scott was retained until February, 1982, at which time Petitioner

terminated his services.

6. Petitioner commenced the present action against Respondent's deceased for legal malpractice on January, 1983.

## 2. Proceedings Below

Petitioner instituted the present action for legal malpractice on January 12, 1983, in the U.S. District Court for the Middle District of Georgia, Athens Division based on diversity of citizenship.

Petitioner, administrator of the Estate of Lillie D. Price, was and is a resident of Alaska; defendant, executrix of the Estate of Guy B. Scott, Jr., is a resident of Georgia and the corpus of the Estate is located in Georgia.

The District Court issued a four page order directing summary judgment against petitioner on March 17, 1987, finding that Petitioner's cause of action was time-barred by the statute of limitations. (A-1).

Petitioner presented a substantial body of

case law and precedent in his brief opposing the Motion for Summary Judgment and in his brief to the Eleventh Circuit. The court did not comment on these cases which 1) establish circumstances which toll the statute of limitations, and 2) provide that whether the circumstances of the fraud are sufficient to toll the statute is a jury question. The court denied Petitioner's Motion for Reconsideration and Petitioner filed a Notice of Appeal to the U.S. Court of Appeals for the Eleventh Circuit on April 9, 1987. The Court of Appeals affirmed the District Court and awarded costs on September 28, 1987, without opinion. Pursuant to 28 U.S.C. § 2101(c), Petitioner now seeks review of the Eleventh Circuit's affirmance of the District Court's order for summary judgment.

#### REASONS FOR GRANTING THE WRIT OF CERTIORARI

Federal courts are bound to apply state law to matters of substantive law. Erie v.

Thompkins, 304 U.S. 64 (1938). As a general principle, courts rely on the opinion of the most superior court most clearly on point. This case involves the tolling of the Georgia statute of limitations; specifically, whether the running of the statute of limitations tolled during Mr. Scott's representation of the Estate.<sup>1</sup> The relevant Georgia statute provides:

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<sup>1</sup>The cause of action of an individual for legal malpractice runs from the date of the commission of the wrongful act. Kilby v. Shepherd, 177 Ga.App. 462, 339 S.E.2d 742 (1986); Jankowski, et al. v. Taylor, Bishop & Lee, et al., 246 Ga. 804, 273 S.E.2d 16 (1980). Where the cause of action is one in tort for the negligent performance of professional duties, the statute of limitation is two years. O.C.G.A. § 9-3-33 (Michie 1982). Where the cause of action is for breach of contract, a four year statute of limitations applies. O.C.G.A. § 9-3-25 (Michie 1982). The parties agree that absent tolling, the statute of limitations for the malpractice action against Respondent's deceased expired June 9, 1981. If the statute was tolled, the statute of limitations would not have commenced to run until February 26, 1982, the date Petitioner terminated the attorney's services. As the complaint was filed on January 12, 1983, this action would not be time-barred if relevant tolling principles are applied.

if the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of plaintiff's discovery of the fraud. O.C.G.A. §9-3-96. (Michie 1982).

The District Court's order reflects two errors. First, in reference to the tolling statute, the court failed to apply Georgia case law requiring that where there are facts involving fraud or excuses for delay in discovering the fraud so as to deter the party from bringing his cause of action, the question is one of mixed law and fact and should be determined by the jury under instructions from the court. Larkins v. Boyd, et al., 205 Ga. 69, 52 S.E.2d 307, 310 (1949); Leagan v. Levine, 158 Ga.App. 293, 279 S.E.2d 741 (1981); Lorentzson v. Rowell, et al., 171 Ga.App. 821, 321 S.E.2d 341 (1984), cert. denied Sept. 4, 1984, cert. granted Sept. 10, 1984; Sutlive v. Hackney, 164 Ga.App. 740, 297 S.E.2d 515, 518 (1982);

United States Fidelity & Guaranty Co. v.  
Toombs County, 187 Ga. 544, 1 S.E.2d 411  
(1939). Whether the assertions and omissions  
of Respondent's deceased rose to the level  
of fraud necessary to toll the statute of  
limitations is a matter for jury  
determination and the District Court should  
not have entered summary judgment in favor  
of Respondent.

Second, the major portion of  
Petitioner's brief to the District Court and  
the Eleventh Circuit Court of Appeals  
discussed the Georgia cases which establish  
that an attorney's breach of the duty of  
disclosure constitutes fraud so as to toll  
the statute of limitations until the fraud  
is discovered. The District Court did not  
address the substantial line of Georgia  
Supreme Court and Court of Appeals  
decisions Petitioner presented in his  
brief. Instead, the court relied on one  
opinion from the Georgia Court of Appeals

which is distinguishable from the facts of Petitioner in the instant case: Kilby v. Shepherd, 177 Ga.App. 462, 339 S.E.2d 742 (1986). Making no reference to the significant body of case law petitioner presented on appeal, the Court of Appeals for the Eleventh Circuit affirmed without opinion and awarded costs to the defendant.

The United States District Court and the Court of Appeals for the Eleventh Circuit apparently rejected three recognized circumstances which toll the statute of limitations in Georgia. The statute is tolled where the plaintiff can show 1) actual fraud, 2) a duty to make disclosure of a wrong by reason of fact and circumstances, or 3) the existence of a confidential relationship. Sutlive v. Hackney, 164 Ga.App. 740, 742, 297 S.E.2d 515, 517 (1983).<sup>2</sup> The lower courts

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<sup>2</sup>Although Georgia cases impose a duty of ordinary diligence to discover the existence of fraud, a plethora of cases

overlooked the rule recognized by the Georgia Supreme Court that where there is a relationship of trust and confidence between the parties, a breach of the duty to make disclosure will toll the statute of limitations until discovery of the fraud. Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 246 (1980); Lowe v. Presley, 86 Ga.App. 328, 333, 71 S.E.2d 730, 734 (1952) citing Universal Garage Co., Inc. v. Fowler, 57 Ga.App. 668, 196 S.E. 198 (1938); also see, Persons v. Jones, 12 Ga. 371(2), 375 (1853); Union Circulation Co., Inc. v. Trust

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consistently excuse this duty where a confidential or fiduciary relationship exists. Brown v. Brown, 209 Ga. 620, 75 S.E.2d 13 (1953); Comerford v. Hurley, et al., 154 Ga.App. 387, 268 S.E.2d 358 (1980), cert. granted May 28, 1980; Georgia Power Company v. Womble, 150 Ga.App. 28, 256 S.E.2d 640 (1979); Kirkley v. Sharp, 98 Ga. 484, 25 S.E.2d 562 (1896); Larkins v. Boyd, et al., 205 Ga. 69, 52 S.E.2d 307 (1949); Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 246 (1980); Stephens v. Walker, 193 Ga. 330, 18 S.E.2d 537 (1942); Webb v. Lewis, 133 Ga.App. 18, 209 S.E.2d 712 (1974); Union Circulation Company, Inc. v. Trust Company Bank, et al., 143 Ga.App. 715, 240 S.E.2d 100 (1977).

Company Bank, et al., 143 Ga.App. 715, 240 S.E.2d 100 (1977); see also Universal Garage Company, Inc. v. Fowler, 57 Ga.App. 668, 196 S.E.2d 198 (1938). The failure to disclose is viewed as a continuing fraud so that the statute does not begin to run until the fraud is discovered. Lowe, supra, at 734; United States Fidelity Guaranty Co. v. Toombs County, 187 Ga. 544, 1 S.E.2d 411 (1939). There is no question that Georgia recognizes the attorney/client relationship as a confidential or fiduciary one:

The law making the relationship of attorney and client confidential is a salutary one, and it is the duty of the courts to strictly enforce it. That relationship makes it imperative that the client rely implicitly upon the acts and words of his attorney, and he is entitled to the protection of law in reposing this confidence. Lowe v. Presley, supra at 733, quoting Lewis v. Foy, 189 Ga. 596, 600, 6 S.E.2d 788, 791 (1940).

The United States District Court and the Court of Appeals for the Eleventh Circuit failed to defer to the Georgia Supreme Court's finding that a party's

failure to disclose that which ought to be disclosed, "is as much a fraud in law as an actual affirmative false representation." Brown v. Brown, 209 Ga. 620, 75 S.E.2d 13 (1953); also see, Lowe v. Presley, 86 Ga.App. 328, 333, 71 S.E.2d 730, 734 (1952). The finding of the Georgia Court of Appeals that concealment of a fact when the party is interrogated concerning it, of itself suggests fraud, Lorentzson, supra, 321 S.E.2d at 345, quoting, First National Bank of Winston v. Atlanta Rubber Co., 77 Ga. 781(1)(1886), is directly applicable to the facts of Petitioner's case.

In its Order for Summary Judgment the District Court ignored the principles established by these cases and instead relied on Kilby v. Shepherd, 177 Ga.App. 462, 339 S.E.2d 742 (1986). In Kilby, the Georgia Court of Appeals found that the "fraud . . . must be of that character which involves moral turpitude . . ." Id., 339

S.E.2d at 743. "Moral turpitude" means "inherent baseness or vileness of principles or action . . . in general . . . anything done contrary to justice, honesty, modesty, or good morals." Black's Law Dictionary (1983 edition). Respondent's deceased's behavior in repeatedly representing to Petitioner that which was not true clearly falls within the category of behavior regarded as moral turpitude. His failure to account for and deposit funds received from Petitioner's rental properties for which he was responsible are also "contrary to honesty." Id. The Kilby opinion does not reveal that the attorney affirmatively misrepresented his actions contrary to his duty of honesty; the Kilby attorney simply failed to exercise the requisite level of skill in the practice of law. The Kilby case is further distinguished from the instant case in that the Kilby client did not show that the attorney's actions

prevented her from bringing her claim. In the instant case, Petitioner periodically inquired as to the status of his case and the attorney plainly misrepresented his true actions. Petitioner resided in Alaska and was entirely dependent upon his Georgia lawyer's representations, as Georgia law not only permits but encourages. Lowe, supra. The attorney's misrepresentations misled Petitioner, effectively preventing Petitioner from discovering the fraud and seeking redress. The Kilby client does not allege that her attorney actively, affirmatively misled her, only that he failed to disclose his actions and omissions.<sup>3</sup> Thus, Kilby is not applicable

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<sup>3</sup>While Petitioner would argue that in Kilby the Georgia Court of Appeals failed to apply the full body of law in this area to the Kilby facts, specifically the line of cases imposing a duty of disclosure and the tolling of the statute of limitations where it is breached, see this petition supra pages 8, 10, 13, 15, and 16, the Kilby case is readily distinguishable from Petitioner's situation. When the Kilby facts and rationale are scrutinized, Kilby is not

to the instant case.

The Georgia Supreme Court has never overruled the line of cases which established the exception for confidential relationships nor has it limited its application. Indeed, as recently as 1980, the Georgia Supreme Court reiterated that a breach of duty of disclosure will toll the statute. Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 246 (1980). The Georgia Court of Appeals also applied this exception as recently as 1982. Sutlive v. Hackney, 164 Ga.App. 740, 297 S.E.2d 515 (1982), cert. denied 1983, reconsid. denied 1983. Thus, this line of cases continues to stand in Georgia and the failure of the United States District Court and the Court of Appeals for the Eleventh Circuit to apply these principles to Petitioner's facts was error.

This petition presents for  

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incompatible with Petitioner's position.

consideration an issue which is of substantial importance both to the legal profession and to the myriad of clients who place trust and confidence in lawyers. It directly impacts the accountability, liability, and integrity of the legal community. The effect of the lower court's decisions is to lower the ethical standards to which attorneys are accountable in Georgia. An attorney is in a unique position of confidence which enables him or her to conceal mistakes of judgment and failure to perform in compliance with the professional standard of skill. Laws themselves are murky and complex and the legal process can be extremely slow-moving and at times tortuous. A client, most especially one who lives out of state, is not in a position to monitor either the progress of his case or the competence of his attorney. In Georgia this reliance has always been encouraged and specially

protected. Lowe, supra. To require a client to continuously monitor and seek to uncover not only his attorney's errors but also any fraudulent motive in failing to report them to the client in a timely manner in order to preserve his cause of action for legal malpractice will undermine not only the relationship of the individual client with his attorney, but will further undermine the general public's already shaken faith in our legal system. The decision of the District Court and the Court of Appeals disregards the special status and standard traditionally accorded relationships of trust and confidence in Georgia and without precedent sets the legal profession apart from other professions. Physicians, accountants, and other professionals in relationships of trust and confidence cannot escape liability for their malpractice either by failing to bring it to the attention of the relying party or, as in

Petitioner's case, by denying or evading the issue when timely inquiry is made. Leagan, supra at 742, citing, Brown v. Brown, 209 Ga. 620, 75 S.E.2d 13 (1953); Lorentzson, supra; Sutlive, supra.

In the instant case, the Georgia attorney failed to disclose his own negligence in allowing a prior malpractice claim to become time-barred. Further, he affirmatively represented repeatedly to his client, an Alaska resident, that he was continuing to work diligently on a cause of action to set aside a deed when in fact he was doing nothing. This failure to disclose pertinent facts and the affirmative representation of that which was not true satisfy the applicable standards and toll the Georgia statute of limitations because these acts and omissions occurred in the context of a confidential relationship. Therefore, this legal malpractice action is not time-barred and the summary judgment

against Petitioner should be reversed.

### CONCLUSION

Because Respondent's deceased affirmatively misrepresented the status of Petitioner's case, thereby breaching the duty of disclosure the law imposes on the attorney, and constituting a fraud upon Petitioner, the statute of limitations did not begin to run until the discovery of the fraud pursuant to O.C.G.A. § 9-3-96.

Summary judgment against Petitioner on the grounds that the statute of limitations barred Petitioner's claims was clearly error. The question of fraud under these facts and the legal precedents should have gone to the trier of fact. The United States Court of Appeals erred when it affirmed the District Court's summary judgment and awarded costs against Petitioner.

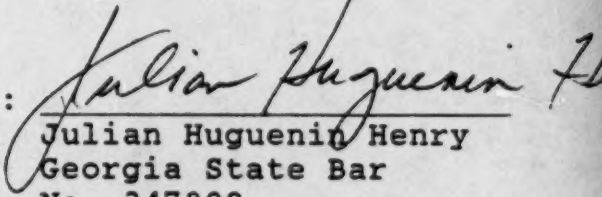
For the foregoing reasons, Petitioner respectfully requests this Court grant his

petition for writ of certiorari on behalf  
of William D. Price, Jr.

Respectfully submitted,

HENRY & PEARSON, P.C.

By:

  
Julian Huguenin Henry  
Georgia State Bar  
No. 347800  
Counsel for Petitioner

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Athens, Georgia 30603-0808  
(404) 546-1395

CERTIFICATE OF SERVICE

As a member of the Bar of the United  
States Supreme Court, I hereby certify that  
on this 23rd day of December, 1987, three  
copies of the enclosed Petition for  
Certiorari were mailed express mail, postage  
prepaid, to:

Mr. Jim Hudson  
Hudson & Montgomery  
P.O. Box 8068  
Athens, Georgia 30603

I further certify that all parties  
required to be served have been served.

This 23rd day of December, 1987.

*Julian Huguenin Henry*  
Julian Huguenin Henry  
Counsel for Petitioner

HENRY & PEARSON, P.C.  
P.O. Box 808  
Athens, Georgia 30603  
(404) 546-1395

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 87-8258  
Non-Argument Calendar

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D.C. Docket No. 83-3

WILLIAM D. PRICE, JR.,  
Administrator of the Estate  
of LILLIE D. PRICE,

Plaintiffs-Appellants,

versus

VIRGINIA ROGERS SCOTT,  
Executrix of the Estate of  
GUY B. SCOTT, JR.,

Defendants-Appellees.

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Appeal from the United States  
District Court for the Middle  
District of Georgia

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Before VANCE, KRAVITCH and JOHNSON, Circuit  
Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 28, 1987  
For the Court: Miguel J. Cortez, Clerk

By: \_\_\_\_\_  
Deputy Clerk

ISSUED AS MANDATE: October 28, 1987

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 87-8258  
Non Argument Calendar

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WILLIAM D. PRICE, JR.,  
Administrator of the Estate  
of LILLIE D. PRICE,

Plaintiffs-Appellants,

versus

VIRGINIA ROGERS SCOTT,  
Executrix of the Estate of  
GUY B. SCOTT, JR.,

Defendants-Appellees.

---

Appeal from the United States  
District Court for the Middle  
District of Georgia

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(September 28, 1987)

Before VANCE, KRAVITCH and JOHNSON, Circuit  
Judges.

PER CURIAM:

Affirmed on the basis of the District  
Court's Order dated March 17, 1987.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
ATHENS DIVISION

WILLIAM D. PRICE, :  
JR., etc., :  
Plaintiff, :  
 :  
vs. : CA No. 83-3-ATH (WDO)  
 :  
VIRGINIA ROGERS :  
SCOTT, etc., :  
Defendant. :  
\_\_\_\_\_ :

O R D E R

Plaintiff, as administrator of the estate of Lillie D. Price, has brought action against defendant, as executrix of the estate of Guy B. Scott, Jr., for alleged legal malpractice on the part of defendant's deceased. Defendant has filed a motion for summary judgment on the ground that the applicable statute of limitations laws bars plaintiff's claims. Pursuant to Rule 56, Fed.R.Civ.P., the following is this court's findings of fact and conclusions of law.

### FINDINGS OF FACT

For the purposes of this motion the relevant facts are not in dispute.

1. Sometime in 1973, plaintiff's deceased, Lillie D. Price, retained the services of a lawyer, Grady Pittard, to file an action in equity to have a deed set aside. Said lawyer agreed to pursue the action. However, he simply ignored the case and took no action to have the deed set aside.

2. Subsequent to Mrs. Price's death on April 1, 1975, plaintiff was appointed administrator of her estate. Plaintiff then immediately retained the legal services of defendant's deceased, Guy B. Scott, Jr. From May, 1975, until February 26, 1982, Mr. Scott acted as the attorney for the estate of plaintiff's deceased. At the time of hiring Mr. Scott, plaintiff related to Mr. Scott his desire to further pursue the action to set aside deed, and told him about

the previous lawyer's lack of diligence in seeking the same for Mrs. Price before her death. Mr. Scott failed to take any steps in regard to the action to set aside deed after he gave assurances he would. Mr. Scott died sometime after the plaintiff terminated his services.

3. Plaintiff instituted the present action against defendant's deceased, for legal malpractice, on January 12, 1983.

#### CONCLUSIONS OF LAW

The plaintiff has brought a legal malpractice claim against the defendant's deceased on two grounds. The first ground alleges that Mr. Scott committed malpractice in not pursuing the action to set aside (sic) deed. The second ground alleges that Mr. Scott failed to advise Mr. Price that he had grounds to sue the plaintiff's deceased's previous lawyer for legal malpractice.

" '[T]he cause of action of an individual for legal malpractice arises immediately upon the commission of the wrongful act', and may be brought for commissionof (sic) a tort for negligence in failing to exercise the required degree of skill or breach of contract." Kilby v. Shepard, 177 Ga. App. 462, \_\_\_\_\_, 339 S.E.2d 742, 743 (1986) (quoting Hamilton v. Powell, Goldstein, Frazier & Murphy, 167 Ga. App. 411, 414, 306 S.E.2d 340, 343 (1983) (emphasis added)). Such a cause of action that sounds in tort is subject to the two year limitation period of O.C.G.A. § 9-3-33 (Michie 1982). See 167 Ga. App. at 413, 306 S.E.2d at 342. If the cause of action is deemed a breach of contract, it is subject to the four year limitation period of O.C.G.A. § 9-3-25 (Michie 1982). See Jankowsky v. Taylor, Bishop & Lee, 154 Ga. App. 753, 755, 273 S.E.2d 16 (1980). "In an

action for damages against an attorney ...., the statute of limitations runs from the date of the breach of the duty and not from the time when the extent of the resulting injury is ascertained nor from the date of the client's discovery of error." Id. at 755, 273 S.E.2d at 18. For purposes of this motion, the parties agree that, absent tolling, the statute of limitations ran for a malpractice action against defendant's deceased at the latest on June 9, 1981. Since the instant suit was not filed until January 12, 1983, it would seem to be barred.

The plaintiff, however, contends that O.C.G.A. § 9-3-96 (Michie 1982) as applied to the facts of this case, operated to toll the statute of limitations until plaintiff fired Mr. Scott on February 26, 1982. The court disagrees.

In the Kilby decision cited by the court above, the plaintiff brought action

against her former attorney for his alleged negligence in pursuing an action to set aside certain deeds. In that case the trial court granted summary judgment and found that the statute of limitations barred plaintiff's claim. The plaintiff appealed on the grounds that the attorney's failure to inform her about his actions and her options, while pursuing the action to set aside deed, constituted such fraud that it tolled the applicable statute of limitations until she became aware that a problem existed. 177 Ga. App. at \_\_\_\_\_, 339 S.E.2d at 743.

The court of appeals disagreed with this argument and stated that " '[t]he fraud which will relieve the bar of the state of limitations must be of that character which involves moral turpitude, and must have the effect of debarring or deterring the plaintiff from his actions." Id. at \_\_\_\_\_,

339 S.E.2d at 743 (quoting Riddle v. Driebe, 153 Ga. App. 276, 280, 265 S.E.2d 92, 95 (1980)). The court then went on to state that "[s]ince appellant did not show that she was prevented or deterred by any act of appellee from discovering his alleged negligence or from bringing her malpractice action, there is nothing upon which she can base her claim of fraud and the statutes of limitation were not tolled." Id. at \_\_\_\_, 339 S.E.2d at 744.

The plaintiff suffers from the same problem in the instant case. He has not shown<sup>1</sup> any facts, either in his complaint or

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<sup>1</sup>The plain language of Rule 56(c), Fed.R.Civ.P., mandates the entry of summary judgment, upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. There is no requirement that the defendant, in the case at bar, negate the elements of plaintiffs' claim. See also Riberglass, Inc. v. Techni-Glass Indus., Inc., No. 86-7057 (11th Circ. Dec. 4, 1986) ("Celotex makes clear that once a properly supported motion for summary judgment has been made it is not incumbent upon the movant to produce evidence negating

affidavits, that shows that defendant's deceased intentionally deterred the plaintiff from discovering his alleged negligence. Without such a showing, the plaintiff cannot support the actual fraud that is needed to toll the applicable statute of limitation.

Accordingly, the defendant's motion is GRANTED and a judgment will be entered for defendant and against the plaintiff.

SO ORDERED, this 17th day of March, 1987.

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Wilbur D. Owens, Jr.  
United States District Judge

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the existence of a genuine issue of fact as to issues or elements that the nonmovant must prove at trial.").